

**BEFORE  
THE PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA**

**DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E**

In Re: )  
)  
Friends of the Earth and Sierra Club, )  
)  
Complainants/Petitioners, )  
)  
v. )  
)  
South Carolina Electric & Gas Company )  
)  
Defendant/Respondent. )  
)  
\_\_\_\_\_ )  
)

**SPEAKER OF THE HOUSE  
JAMES H. "JAY" LUCAS'S  
PRE-HEARING BRIEF**

In Re: )  
)  
Request of the South Carolina Office of )  
Regulatory Staff for Rate Relief to )  
SCE&G Rates Pursuant to )  
S.C. Code Ann. § 58-27-920 )  
\_\_\_\_\_ )  
)

In Re: )  
)  
Joint Application and Petition of South )  
Carolina Electric & Gas Company and )  
Dominion Energy, Inc., for review and )  
Approval of a proposed business )  
combination between SCANA )  
Corporation and Dominion Energy, Inc., )  
as may be required and for a prudency )  
determination regarding the )  
abandonment of the V.C. Summer Units )  
2 & 3 Project and associated customer )  
benefits and recovery plan. )  
\_\_\_\_\_ )

Pursuant to Order No. 2018-102-H of the Public Service Commission (the Commission), Intervenor James H. “Jay” Lucas, in his capacity as Speaker of the South Carolina House of Representatives (Speaker Lucas), submits the following pre-hearing brief.

### **INTRODUCTION**

Before the Commission is one of the most difficult and complex legal challenges it and the State of South Carolina has ever faced. South Carolina Electric & Gas Company and Dominion Energy, Inc. (the Joint Applicants) seek the Commission’s approval of a proposed business merger and for a prudency determination regarding the abandonment of two nuclear units, V.C. Summer Units 2 and 3 (the Project). The Commission must review the abandonment request pursuant to the Base Load Review Act (the BLRA), S.C. Code Ann. § 58-33-210, *et seq.* Speaker Lucas respectfully requests the Commission apply the statutory framework of the BLRA as it determines whether to allow the continued recovery of revised rates post-abandonment and the statutory criteria for determining the prudency of SCE&G’s actions.

### **BASE LOAD REVIEW ACT**

The General Assembly enacted the BLRA in 2006. The BLRA created a new mechanism for utilities to recover construction costs of nuclear plants. Specifically, the BLRA authorizes the utility to file an application seeking the Commission’s approval to construct a nuclear-powered facility. To construct a nuclear plant, a utility must seek a prudency determination from the Commission that can allow for the recovery of incurred capital costs during the construction of a nuclear facility. Upon completion of review of a utility’s application, the Commission is authorized to issue a base load review order approving rate recovery for plant capital costs. An order may further establish, among other things, the construction schedule, the estimated capital costs, and the return on equity.

The BLRA also describes the conditions for determining what costs may properly be included in rates. The BLRA, in pertinent part, provides as follows:

A base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses and are properly included in rates so long as that plant is constructed or being constructed within the parameters of (1) the approved construction schedule including contingencies, and (2) the approved capital costs estimates including specific contingencies.

S.C. Code Ann. § 58-33-275(A). In other words, the BLRA authorizes a utility to recover its constructions costs so long as the plant is constructed or is being constructed.

Prior to completion of construction, a utility may determine to abandon the construction of a nuclear plant. If the utility chooses to do so, the BLRA establishes a procedure for the utility to follow under which the Commission may determine whether the abandonment decision is prudent.

To that end, the BLRA provides the following:

[T]he recovery of the utility's capital costs and the utility's cost of capital associated with them may be disallowed only, to the extent that the failure by the utility to anticipate or avoid the allegedly imprudent costs, or to minimize the magnitude of the costs, was imprudent considering the information available at the time that utility could have acted to avoid or minimize the costs.

S.C. Code Ann. § 58-33-280(K).

The General Assembly amended the BLRA in 2018. See 2018 S.C. Act No. 287. Act 287 instructed the Commission to set an experimental rate for SCE&G at a level equal to its current rate less the revised rate increases. Act 287 further provided the experimental rate would terminate upon a final ruling of the Commission in this proceeding. Additionally, Act 287 repealed the BLRA for any future projects and provided definitions of "prudence," "imprudence," and "fraud."

## ARGUMENT

Speaker Lucas urges the Commission to utilize the statutory framework provided by the General Assembly plainly and unambiguously in the BLRA. As the Commission analyzes the evidence put forth by the Joint Applicants, the Commission must be mindful of reading the statutes together—and not in isolation—in determining an appropriate rate. Further, the Commission must apply the definitions set forth in Act 287 to this proceeding.

As noted above, subsection 58-33-275(A) of the South Carolina Code provides that “a base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses” that “are properly included in the rates so long as that plant is constructed or being constructed within the parameters of (1) the approved construction schedule including contingencies; and (2) the approved capital costs estimates including specific contingencies.” (emphasis added); see also S.C. Code Ann. § 58-33-275(C) (limiting recovery to when a plant “is constructed or being constructed”). A plain reading of these statutes reveals that SCE&G’s claim to continue recovering revised rates evaporated upon abandonment of the Project.

Subsection 58-33-275(B) does not alter the limitations of subsections 58-33-275(A) and (C). Subsection (B) only precludes alteration of the approved rates during construction or when a project is properly completed. If the utility fails to satisfy the requirements of subsection (A), it loses the nonreviewability protections offered in subsection (B). Further, subsection 58-33-280(K) does not allow for full recovery of the nuclear rates just because an initial prudency determination to begin construction was made under subsection 58-33-275(A). Instead, subsection 58-33-280(K) requires the utility to show abandonment was prudent, and if the PSC agrees, then it retains the discretion to determine which costs and expenses, if any, are recoverable. See Hodges v. Rainey,

341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly].”); Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994) (“If a statute’s language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.”).

The “[w]ithout limiting the effect of [s]ection 58-33-275(A)” language in subsection 58-33-280(K) does not bind or restrict the PSC’s abandonment analysis. Rather, it means a party cannot end-run subsection 58-33-275(A) while construction is ongoing by seeking to readdress prudence determinations or rate orders. See S.C. Energy Users Comm. v. S.C. Elec. & Gas, 410 S.C. 348, 358–59, 764 S.E.2d 913, 918–19 (2014) (holding that an abandonment analysis is improper during construction of a nuclear project because “the possibility of prudence challenges while construction was underway increased the risks of these projects as well as the costs and difficulty of financing them”).

Here, because the Project was not constructed or under construction after SCE&G abandoned it on July 31, 2017, SCE&G is not entitled to recover any revised rates from that date forward. See S.C. Elec. & Gas Co. v. Randall, No. 3:18-cv-01795-JMC, 2018 WL 3725742, at \*11 n.23 (D.S.C. Aug. 6, 2018) (asserting that “because SCE&G abandoned the Project on July 31, 2017, SCE&G cannot legitimately claim an entitlement to revised rates collected after abandonment because it was no longer constructing the Project”).

Next, Speaker Lucas would urge the Commission to use the definitions provided by the General Assembly in Act 287. Given that the BLRA never defined prudence, Act 287 provided specificity and clarity as to this term. To the extent the definition could be deemed retroactive in effect, the General Assembly properly exercised its legislative power. Indeed, it is well-settled

that laws “adjusting the burdens and benefits of economic life” enjoy “a presumption of constitutionality.” Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). As the U.S. Supreme Court has held, “legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.” Pension Ben. Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984). “This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.” Usery, 428 U.S. at 16. Accordingly, the definition of prudence applies to the present proceeding before the Commission.

### **CONCLUSION**

Speaker Lucas respectfully requests the Commission use this brief to assist it with its review of the factual evidence presented in the trial. The General Assembly has expended extensive time and resources analyzing the BLRA and trusts this brief provides the Commission with clarity as to the General Assembly’s intent.

s/Robert E. Tyson, Jr.

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